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CERTIFIED FOR PARTIAL PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL THERRIAN, Defendant and Appellant.	C040937 (Super. Ct. No. 12744-C)

APPEAL from a judgment of the Superior Court of San Joaquin County, Michael N. Garrigan, Judge. Affirmed.

Ross Thomas, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Senior Assistant Attorney General, Janis Shank McLean, Supervising Deputy Attorney General, Jane N. Kirkland, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Michael Therrian appeals from an order of recommitment entered after a jury determined he remains a

sexually violent predator under the Sexually Violent Predator Act (Welf. & Inst. Code, § 6600 et. seq. (SVPA)).[1]

In the published portion of this opinion,[2] we conclude that when an expert's opinion regarding the likelihood of defendant reoffending is not based solely upon the results of a Static-99 test (which assigns a risk assessment of reoffending), a *Kelly*[3] hearing on the admissibility of expert's testimony regarding the test is not required.

In the unpublished parts of our opinion, we reject defendant's contention the SVPA violates the state and federal constitutional proscriptions against cruel and unusual punishment.

Accordingly, we affirm the order of recommitment.

BACKGROUND[4]

In 1988, defendant was charged with 14 counts of lewd acts upon a child, ages 10 to 13, in Lake County (Pen. Code, § 288, subd. (a)). He pled guilty to counts II through IV and was sentenced to 10 years in prison. Defendant admitted touching

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[1] Further undesignated statutory references are to the Welfare and Institutions Code.

[2] The Reporter of Decisions is directed to publish the opinion except for Parts I and III of the Discussion.

[3] *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*).

[4] Some of the following facts are taken from this court's unpublished opinion in a prior appeal from defendant's initial order of commitment. (*People v. Therrian* (Feb. 28, 2001, C032087).)

the victim in count II over the boy's clothing while babysitting him in 1987 after the boy had expressed an interest in pornography. Counts III and IV involved 1988 incidents in which defendant admitted to touching three other boys, two of whom he gave money and orally copulated. When interviewed by his probation officer, defendant denied ever using violence and maintained "all four of the boys wanted to engage in this type of activity."

In 1994, defendant again pled guilty to one count of a lewd act upon a child and was sentenced to eight years in prison. Defendant admitted to touching a 12-year-old boy, the son of a friend of defendant's wife, over the boy's clothing.

In addition to his convictions, defendant has committed other molestations. Though only convicted for molesting two of the 1988 Lake County victims, defendant admitted molesting all four boys involved. Additionally, in 1985, defendant was arrested in San Francisco for molesting a five-year-old and an 11-year-old boy. While defendant denied doing anything with the 11-year-old boy at trial, he admitted to "having sex" with him in an interview with his probation officer. He maintained, however, that he never touched the five-year-old boy.

On April 9, 1998, prior to the completion of defendant's sentence for the 1994 conviction, the San Joaquin County District Attorney's Office petitioned to have defendant committed as a sexually violent predator under Welfare and Institutions Code section 6600 et seq. A jury sustained the

petition and the court ordered him committed to the Department of Mental Health for two years.

On December 13, 2000, the People filed a petition for recommitment to extend defendant's commitment for two years. At defendant's jury trial, the People presented the testimony of psychologist Dr. Amy Phenix and psychiatrist Dr. Gabrielle Paladino. Both mental health experts opined that defendant suffers from a diagnosed mental disorder that makes him likely to engage in predatory and sexually violent criminal behavior in the future. Both mental health experts gave defendant a score on the Static-99 test during their evaluations.

The Static-99 test is an actuarial instrument that allows an evaluator to place sexual offenders in different risk categories based on historical (static) factors such as age, marital status, the number of prior offenses, the relationship of the offender to the victims and the gender of the victims. After identifying the particular characteristics of the offender, the Static-99 test assigns a numeric score to them. The total score of the test is a percentage chance of the defendant's likelihood of being convicted for a future sexual offense.

Dr. Phenix's application of the Static-99 test indicated a 52 percent chance that defendant will reoffend within 15 years. Dr. Paladino scored defendant one point higher on the Static-99 test. Dr. Phenix testified that the Static-99 test was only the beginning of her analysis of the risk that defendant would reoffend. She explained that psychologists do not have

actuarial instruments that encompass all the known risk factors obtained from research on sexual reoffenders. Consequently, she examined risk factors outside the Static-99 test that are both static and dynamic in nature. They included deviant sexual preference or interests, participation in sex offender treatment, developmental risk factors, cooperation with supervision, intimacy deficits, self-recognition of problem, substance abuse, and mood state.

In this evaluation the process of determining the likelihood of defendant reoffending requires adjusting the actuarial risk assessment. Yet, even if she were to entirely disregard the Static-99 test, her clinical opinion, based on known research, was that defendant is likely to reoffend.

Although Dr. Paladino also applied the Static-99 test to defendant, her opinion that defendant is likely to reoffend was independent of the actuarial score. She opined that defendant was in the highest classification for sex offending -- "in a class almost by himself." While she did use the Static-99 test to get a "general thumbnail estimate of where [she] thought [defendant] would fall," she did not rely on the test and her opinion that defendant is likely to reoffend would not change in its absence.

With respect to the reliability or accuracy of the Static-99 test, Dr. Phenix testified that the developer of the Static-99 test is continuing to revise the instrument and has never said it was perfect. Dr. Paladino testified that she was not aware of a study showing that adjusting the actuarial risk

assessment has been tested and found to be accurate and that the Static-99 test does not evaluate dynamic risk factors that impact risk assessment.

Finally, Dr. John Podboy testified on behalf of defendant. He opined that defendant's behavior was opportunistic, not predatory, and that defendant had control over his behavior. He testified that the Static-99 test is a work-in-progress and its reliability is unknown. He opined that the factors considered in the Static-99 test are important and must be considered, but objected to using the assessment as an "arithmetic personality profile."

The jury found defendant was a sexually violent predator within the meaning of the SVPA and he was civilly recommitted to the Department of Mental Health for two years, commencing on February 10, 2001.

DISCUSSION

I

Mootness

Initially, we address the People's assertion that this appeal should be dismissed as moot because the two-year commitment challenged here expired on February 9, 2003. However, the People have not filed a motion to dismiss the appeal on that ground and have failed to provide us with additional facts establishing that the appeal is actually moot. Hence, the mootness claim rests on mere speculation about whether the People filed another petition to extend defendant's

SVPA commitment until February 2005 and, if so, the results of the latest petition.

We decline to dismiss the appeal as moot. On this record, there could be significant collateral consequences for defendant if we were to decide that the order extending his commitment must be reversed, such as by reducing the length of his parole in the constructive custody of the California Department of Corrections (CDC). (See § 6601, subd. (k) [if person is otherwise subject to parole, an SVPA placement shall not toll, discharge, or otherwise affect the term of parole pursuant to Penal Code section 3000 et seq.]; Pen. Code, §§ 3000, subd. (a)(4) [same]; 3000, subd. (b)(1) [parole term for certain violent felonies, including forcible rape]; and 3056 [prisoners on parole remain in legal custody of CDC]; and see *People v. Planavsky* (1995) 40 Cal.App.4th 1300, 1305, fn. 8 [parole consequences show appeal not moot even if defendant has completed sentence]; *People v. Goodson* (1990) 226 Cal.App.3d 277, 280, fn. 2 [appeal not moot though defendant paroled before decision filed, since a favorable disposition on credit issue would constructively advance prison release date and shorten parole period].)

II

Admissibility of the Evidence

The Sexually Violent Predators Act (SVPA) is aimed at "'a select group of criminal offenders who are extremely dangerous as the result of mental impairment, and who are likely to continue committing acts of sexual violence even after they have

been punished for such crimes.'" (*People v. Otto* (2001) 26 Cal.4th 200, 205.) To be classified as a sexually violent predator, a person must have been "convicted of a sexually violent offense against two or more victims[,]" and suffer from a "diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (§ 6600, subd. (a)(1).)

Defendant argues the testimony of the People's experts regarding the use and results of the Static-99 test should have been excluded as a violation of the test set forth in *Kelly*.[5]

In *Kelly*, the Supreme Court held the admissibility of expert testimony based on "a new scientific technique" requires proof the technique is reliable. (17 Cal.3d at p. 30.) The technique is reliable if the proponent can show: "(1) the technique has gained general acceptance in the particular field to which it belongs, (2) any witness testifying on general acceptance is properly qualified as an expert on the subject, and (3) correct scientific procedures were used in the particular case."[6] (*Wilson v. Phillips* (1999) 73 Cal.App.4th 250, 254.)

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[5] Defendant moved in limine to exclude this evidence on this basis; the motion was denied.

[6] This foundational requirement, formerly referred to as the *Kelly/Frye* test, is now referred to as the *Kelly* test or rule. (*People v. Soto* (1999) 21 Cal.4th 512, 515, fn. 3.)

Kelly applies to unproven techniques or procedures that appear "in both name and description to provide some definitive truth which the expert need only accurately recognize and relay to the jury" such as "machines or procedures which analyze physical data" because "[l]ay minds might easily, but erroneously, assume that such procedures are objective and infallible." (*People v. Stoll* (1989) 49 Cal.3d 1136, 1156.) "However, absent some special feature which effectively blindsides the jury, expert opinion testimony is not subject to *Kelly/Frye*." (*Id.* at p. 1157.) "In most other instances, the jurors are permitted to rely on their own common sense and good judgment in evaluating the weight of the evidence presented to them. [Citations.]" (*People v. Venegas* (1998) 18 Cal.4th 47, 80.)

As explained in *People v. McDonald* (1984) 37 Cal.3d 351: "When a witness gives his personal opinion on the stand -- even if he qualifies as an expert -- the jurors may temper their acceptance of his testimony with a healthy skepticism born of their knowledge that all human beings are fallible. But the opposite may be true when the evidence is produced by a machine: like many laypersons, jurors tend to ascribe an inordinately high degree of certainty to proof derived from an apparently 'scientific' mechanism, instrument, or procedure. Yet the aura of infallibility that often surrounds such evidence may well conceal the fact that it remains experimental and tentative. [Citation.] For this reason, courts have invoked the *Kelly-Frye* rule primarily in cases involving novel devices or processes

such as lie detectors, 'truth serum,' Nalline testing, experimental systems of blood typing, 'voiceprints,' identification by human bite marks, microscopic analysis of gunshot residue, and hypnosis [citation], and, most recently, proof of guilt by 'rape trauma syndrome' [citation]. In some instances the evidence passed the *Kelly-Frye* test, in others it failed; but in all such cases 'the rule serves its salutary purpose of preventing the jury from being misled by unproven and ultimately unsound scientific methods.' [Citation.]" (*People v. McDonald, supra,* 37 Cal.3d at pp. 372-373, overruled on another ground in *People v. Mendoza* (2000) 23 Cal.4th 896, 914.)

Moreover, as explained by the Supreme Court in *People v. Stoll, supra,* 49 Cal.3d 1136: "'We have never applied the *Kelly/Frye* rule to expert medical testimony, even when the witness is a psychiatrist and the subject matter is as esoteric as the reconstitution of a past state of mind or the prediction of future dangerousness, or even the diagnosis of an unusual form of mental illness not listed in the diagnostic manual of the American Psychiatric Association. . . .'" (*Id.* at p. 1157, quoting *People v. McDonald* (1984) 37 Cal.3d 351, 372-373.)

The concern addressed by *Kelly* is not present here. Both Drs. Phenix and Paladino testified that, in their opinion, defendant was likely to reoffend in a sexually violent manner and both experts did utilize the Static-99 test during the course of their evaluation. However, Dr. Phenix testified the Static-99 test does not include all the known risk factors and that the process of determining the likelihood of defendant

reoffending requires adjusting the risk assessment of the test. The Static-99 test is merely the starting point in the expert's analysis.

Similarly, Dr. Paladino testified that the Static-99 test only takes static factors into consideration and that many other risk factors are considered in forming an expert opinion of likelihood to reoffend. Dr. Paladino's opinion that defendant was likely to reoffend was independent of defendant's Static-99 test score. Thus, both experts testified that use of the Static-99 test was not definitive and that other factors were considered in reaching an opinion.

Moreover, Dr. Phenix testified that the instrument was continuing to be revised and Dr. Paladino testified she was not aware of any study indicating that the approach of adjusting actuarial risk assessment has been tested and found to be accurate. Thus, the jury was not told that the procedures were objective and infallible.[7]

"No precise legal rules dictate the proper basis for an expert's journey into a patient's mind to make judgments about his behavior." (*People v. Stoll, supra,* 49 Cal.3d at p. 1154.) Psychological evaluation is "a learned professional *art*, rather than the purported exact 'science' with which *Kelly/Frye* is

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[7] We do not decide whether a *Kelly* hearing is required when an expert's opinion relies solely upon the results of a Static-99 test.

concerned . . . ." (*People v. Stoll, supra,* 49 Cal.3d at p. 1159, orig. emphasis.)

The testimony of both Drs. Phenix and Paladino adequately illustrated this principle by explaining that factors additional to those encompassed in the Static-99 test were utilized and considered in forming their opinions. We are satisfied that no reasonable juror would mistake either expert's use of the Static-99 test as a source of infallible truth on the issue of defendant's risk of reoffending. (See *People v. Stoll, supra,* 49 Cal.3d at p. 1159 [no reasonable juror would mistake expert's reliance on standardized tests such as MMPI as source of infallible truth on personality, predisposition or criminal guilt].)

The court did not err in admitting the expert's testimony regarding defendant's likelihood of reoffending without a *Kelly* hearing. (Accord, *People v. Ward* (1999) 71 Cal.App.4th 368, 374 [expert testimony regarding likelihood of sexually violent predator to reoffend not subject to *Kelly* test].)

III

Cruel and/or Unusual Punishment

Finally, defendant contends that the SVPA is punitive in design and effect, and violates both the state and federal prohibitions against cruel and/or unusual punishment because it targets a category of people based on their status as sex offenders and does not provide a realistic opportunity for the treatment.

Defendant correctly observes a Legislature may not impose a criminal penalty for a "status" offense such as narcotics addiction. (*Robinson v. California* (1962) 370 U.S. 660, 666, [8 L.Ed.2d 758, 763].) "The entire thrust of *Robinson's* interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some *actus reus*." (*Powell v. Texas* (1968) 392 U.S. 514, 533 [20 L.Ed.2d 1254, 1268], orig. emphasis.) However, the premise underlying defendant's argument is flawed. A commitment under the SVPA is not punitive in purpose or effect. (*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1175-1179; see also *Kansas v. Hendricks* (1997) 521 U.S. 346, 362, 369 [138 L.Ed.2d 501, 519] [confinement pursuant to similar Kansas Act not punitive].) Thus, constitutional proscriptions against cruel and unusual punishment do not apply. (*People v. Chambless* (1999) 74 Cal.App.4th 773, 776, fn. 2.)

Furthermore, an SVPA commitment is a civil commitment for treatment and the protection of society. (*Hubbart v. Superior Court, supra,* 19 Cal.4th at pp. 1171-1174; *Kansas v. Hendricks, supra,* 521 U.S. at pp. 361-363 [138 L.Ed.2d at pp. 514-516].) The civil commitment is not based on an individual's status as a sex offender. Conviction of an enumerated sexually violent offense "shall constitute evidence that may support a court or jury determination that a person is a sexually violent predator, but shall not be the sole basis for the determination."

(§ 6600, subd. (a)(3).) It must also be established that the person has a "diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (*Ibid.*)

Finally, our Supreme Court has rejected the argument that sexually violent predators may be committed only if they are guaranteed effective treatment. (*Hubbart v. Superior Court, supra,* 19 Cal.4th at p. 1164.) The court determined that a state is not obliged "to release certain confined individuals who were both mentally ill and dangerous simply because they could not be successfully treated for their afflictions." (*Hubbart v. Superior Court, supra,* 19 Cal.4th at p. 1166, citing *Kansas v. Hendricks, supra,* 521 U.S. at p. 366 [138 L.Ed.2d at p. 518].) Moreover, contrary to defendant's assertions, the SVPA is not a means to prolong incarceration without meaningful treatment. Our Supreme Court has expressly disagreed with the "suggestion that the Act's treatment provisions are a sham, either because the Legislature intended to withhold treatment or because it found that treatment was futile." (*Hubbart v. Superior Court, supra,* at p. 1166.) Treatment is an integral part of the SVPA. The Department of Mental Health must "afford the [sexually violent predator] with treatment for his or her diagnosed mental disorder." (§ 6606, subd. (a).) "This treatment obligation exists even where the chance of success in a particular case is low." (*Hubbart v. Superior Court, supra,* 19 Cal.4th at pp. 1148-1149, citing § 6606, subd. (b).)

We conclude, therefore, the SVPA does not inflict cruel and/or unusual punishment based on an individual's status as a sex offender.

DISPOSITION

The judgment (order recommitting defendant) is affirmed.

BLEASE, Acting P. J.

We concur:

RAYE, J.

MORRISON, J.